



November 26, 2018

The Honorable Jay Inslee
Office of the Governor
P.O. Box 40002
Olympia, WA 98504

Re: Litigation Notice by the U.S. Department of Justice on Substitute House
Bill 1723, "Hanford Site Employees Occupational Disease Presumption"

Dear Governor Inslee:

We, the undersigned, write in response to the U.S. Department of Justice (DOJ) notice to file a civil action against the State of Washington to enjoin the enforcement of Substitute House Bill 1723, codified as Revised Code of Washington (RCW) 51.32.187. We urge you to stand with the Hanford Nuclear site workers who risk their lives to clean up the most contaminated worksite in the western world.¹ As the Department of Energy estimates that clean up at Hanford will take another fifty years *at least*, there will be tens of thousands who will work at the Hanford site who, should they be injured on the job, deserve to know that their claim will be appropriately handled.

It is DOJ's position that the law --

"violates the Supremacy Clause of the U.S. Constitution because it discriminates against the federal government and those with whom it deals, and because it purports to directly regulate the Federal Government. The law, which applies only to workers at the Hanford site, is impermissibly discriminatory because it treats other entities in the State better than it treats federal contractors and the Federal Government. Through such limited application, the law also purports to directly regulate the Federal Government."

¹ Department of Energy, *Performance Management Plan for the Accelerated Cleanup of the Hanford Site*, DOE/RL-2002-47, Rev. D, August 2002.

We disagree. The current third-party administrator that processes workers' compensation claims at Hanford, Penser North America, Inc. (Penser), is required to process those claims in accordance with Washington State law. Specifically, "[t]he Contractor shall submit to DOE (or other party as designated by the Contracting Officer) such payroll records required by the workers' compensation laws of the State of Washington"; "[t]he Contractor shall submit to DOE (or other party as designated by the Contracting Officer), the accident reports provided for by RCW Title 51, Section 51.28.010, or any other documentation requested by DOE pursuant to the workers' compensation laws of the State of Washington"; and "[t]ime loss compensation shall be paid to injured workers in accordance with RCW Title 51.08.178 and other applicable requirements."² In addition, Penser's website acknowledges the involvement of Washington State Board of Industrial Insurance Appeals and Washington State Department of Labor in the compensation claims process.³

RCW 51.32.187 does not violate the Supremacy Clause, but rather is an appropriate response to address the documented history of inadequate treatment of the hazards associated with the Hanford clean up and resulting worker compensation claims. It is commonly recognized that states possess broad authority under their police powers to protect the health, safety, and welfare of its citizenry, and that is precisely the purpose of RCW 51.32.187.

To address the significant hurdles faced by Hanford workers in seeking redress for their workplace injuries, the law expands the definition of occupational disease under RCW 51.08.140 to include: respiratory disease; any heart problems experienced within seventy-two hours of exposure to fumes, toxic substances, or chemicals at the site; certain cancers; beryllium sensitization, and acute and chronic beryllium disease; and neurological disease.⁴ Under the law, "cancer" is limited to:

- (i) Leukemia;
- (ii) Primary or secondary lung cancer, including bronchi and trachea, sarcoma of the lung, other than in situ lung cancer that is discovered during or after a postmortem examination, but not including mesothelioma or pleura cancer;
- (iii) Primary or secondary bone cancer, including the bone form of solitary plasmacytoma, myelodysplastic syndrome, myelofibrosis with myeloid metaplasia, essential thrombocytosis or essential

² Available at <https://www.hanford.gov/page.cfm?page=1048>.

³ *The Unique World of Workers Compensation* presentation slide 2, The Hanford Experience 2010. Available at <http://www.pensernorthamerica.com/hanford/>.

⁴ RCW 51.32.187(3)(a)-(e).

thrombocythemia, primary polycythemia vera (also called polycythemia rubra vera, P. vera, primary polycythemia, proliferative polycythemia, spent-phase polycythemia, or primary erythremia);

(iv) Primary or secondary renal (kidney) cancer;

(v) Lymphomas, other than Hodgkin's disease;

(vi) Waldenstrom's macroglobulinemia and mycosis fungoides;

and

(vii) Primary cancer of the: (A) Thyroid; (B) male or female breast; (C) esophagus; (D) stomach; (E) pharynx, including all three areas, oropharynx, nasopharynx, and hypopharynx and the larynx. The oropharynx includes base of tongue, soft palate and tonsils (the hypopharynx includes the pyriform sinus); (F) small intestine; (G) pancreas; (H) bile ducts, including ampulla of vater; (I) gall bladder; (J) salivary gland; (K) urinary bladder; (L) brain (malignancies only and not including intracranial endocrine glands and other parts of the central nervous system or borderline astrocytomas); (M) colon, including rectum and appendix; (N) ovary, including fallopian tubes if both organs are involved; and (O) liver, except if cirrhosis or hepatitis B is indicated.⁵

The law recognizes that pre-existing conditions may be a factor for some employees and the occupational disease presumption for cancer “only applies to any active or former United States department of energy Hanford site worker who has cancer that develops or manifests itself and who was given a qualifying medical examination upon becoming a United States department of energy Hanford site worker that showed no evidence of cancer.”⁶ In addition, the presumption may be “rebutted by clear and convincing evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.”⁷

There are multiple reasons for Washington to pass a state law to create an occupational disease presumption for Hanford employees. First, there is a long history of safety violations at Hanford resulting in worker injuries. Hanford Challenge and the United Association of Plumbers and Steamfitters, Local Union 598, (UA) filed a civil action on September 2, 2015 against the

⁵ RCW 51.32.187(4)(b)(i)-(vii).

⁶ RCW 51.32.187(4)(a).

⁷ RCW 51.32.187(2)(b).

Department of Energy (DOE) and Washington River Protection Solutions, LLC (WRPS) for failure to comply with the Solid Waste Disposal Act, amended as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (“RCRA”), specifically section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B).⁸ The State of Washington’s Office of Attorney General also filed a separate action, and the two actions were joined. At issue was the failure of DOE and WRPS to address the acute and or chronic illnesses resulting from exposure to Hanford’s toxic chemical vapors since the late 1970s. As our complaint states, “[t]he intent of this action is, among other things, to abate conditions that continue to occur at the Tank Farms that present an imminent and substantial endangerment to health and the environment affecting Hanford Challenge’s members and others.”⁹ After three years of litigation, the parties agreed to a settlement in 2018 that provides for robust monitoring, increased transparency, capturing and treating vapors, and enhanced worker protections. Had that complaint not been filed, those changes would not have happened.

Second, a review of the DOE’s *Notice of Availability of the Draft Waste Incidental to Reprocessing Evaluation for Closure of Waste Management Area C at the Hanford Site* published in the Code of Federal Regulations on June 4, 2018 makes clear that the health of the public and the environment is still not a priority to the DOE. The DOE is now attempting to reclassify high-level radioactive waste so that it may now be managed as low-level radioactive waste.¹⁰ DOE’s plan to ignore the significant safety concerns and leave thousands of gallons of waste in 16 tanks at the Hanford under a layer of grout¹¹ is not only irresponsible, but alarming and further supports the need for the worker protections of RCW 51.32.187.

Third, the Hanford workers’ compensation issues are so widely known that our congressional delegation sought an investigation by the Office of Inspector General (OIG) on March 8, 2017, U.S. Senators Maria Cantwell and Patty Murray requested that the OIG perform a review of workers’ compensation issues at Hanford,¹² asking, *inter alia*, “Are the doctors and/or medical providers selected by Penser qualified to determine health conditions caused by exposure to chemicals at Hanford,” and “Are the doctors and/or medical providers selected by Penser provided all of the necessary and relevant information related to workplace injury or illness to make an accurate determination?” In its report, the OIG concluded that “the

⁸ Available at <https://static1.squarespace.com/static/568adf4125981deb769d96b2/t/57912df72e69cf5810be93a7/1469132281208/Hanford+Complaint.pdf>.

⁹ Ibid. at 6.

¹⁰ See U.S. Department of Energy, *Draft Waste Incidental to Reprocessing Evaluation for Closure of Waste Management Area C at the Hanford Site* (March 2018). Available at <https://www.hanford.gov/files.cfm/DOE-ORP-2018Draft.WIR.Evaluation.pdf>.

¹¹ See id.

¹² Department of Energy, Office of Inspector General, *Audit Report, DOE-OIG-18-44*, Appendix 5, August 2018. Available at <https://www.energy.gov/sites/prod/files/2018/08/f54/DOE-OIG-18-44.pdf>.

Department does not have effective processes, procedures, and controls over the Workers' Compensation Program at the Hanford Site.”¹³

Fourth, in considering RCW 51.32.187, the Washington State Legislature Senate Committee on Labor and Commerce heard testimony that Hanford workers' “claims are denied at five times the rate of other self-insured employers, averaged over the past 5 years,” are “forced to go to Independent Medical Exams that violate state standards,” and “are met with aggressive DOE legal tactics that interfere with objective claims management and create an uneven playing field.”¹⁴ The legislative response to this and other testimony was to overwhelmingly pass RCW 51.32.187.

Simply put, RCW 51.32.187 provides an appropriate mechanism to address the practical problems faced by Hanford workers who are left with not only debilitating, but lethal diseases *resulting from* their employment. This law is similar to the legislature's response to firefighters, who faced nearly identical workplace risks and injuries more than forty years ago.¹⁵ We stand alongside thirty-two other states¹⁶ having adopted similar provisions to provide better protections for firefighters and now we seek to provide the same for our Hanford workers.

We encourage you to continue supporting the Washington citizens who take profound risks every day they go to work at Hanford, putting their lives on the line to ensure the safety of us all.

We deeply appreciate your consideration and are available to discuss or meet with you on

¹³ Ibid. at 1.

¹⁴ Hanford Challenge Executive Director Tom Carpenter Testimony Before the Washington State Senate Committee on Labor & Commerce, January 10, 2018.

¹⁵ See RCW 51.32.185.

¹⁶ Available at <https://www.firstrespondercenter.org/cancer/toolsresources/presumptive-legislation-firefighter-cancer-state/>

this issue at your convenience.

Sincerely,



Tom Carpenter
Executive Director



Randall Walli, Business Manager
United Association of Plumbers and Steamfitters,
Local Union 598

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